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**UNITED STATES DISTRICT COURT  
DISTRICT OF HAWAII**

HAWAI'I WILDLIFE FUND,  
SIERRA CLUB – MAUI GROUP,  
SURFRIDER FOUNDATION,  
AND WEST MAUI  
PRESERVATION ASSOCIATION,

Plaintiffs,

vs.

COUNTY OF MAUI,

Defendant.

Civil Case No. 12-00198 SOM BMK

**DEFENDANT COUNTY OF  
MAUI'S MEMORANDUM IN  
SUPPORT OF THE COUNTY'S  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT AS TO  
WELLS 1 AND 2**

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## **I. INTRODUCTION**

To prevail on their claim that the County of Maui (“County”) violated Clean Water Act (“CWA”) § 301(a) by injecting treated effluent into Wells 1 and 2 at the Lahania Wastewater Reclamation Facility (“LWRF”), Plaintiffs must show the effluent was discharged “to navigable waters from any point source.” 33 U.S.C. §§ 1311(a), 1362(12). Plaintiffs cannot prove that critical fact. Plaintiffs contend the effluent made its way to the ocean—which admittedly is navigable water—but lack evidence the effluent was added to the ocean through a point source. With no evidence of a point source discharge, the County is entitled to summary judgment.

Importantly, the County is entitled to summary judgment on Wells 1 and 2 notwithstanding the Court’s ruling on Wells 3 and 4. Critical to that ruling was the Court’s understanding that the 2013 University of Hawaii Tracer Study (“Tracer Study”) showed 64% of effluent injected into Wells 3 and 4 discharged in the vicinity of the submarine springs. Hawai’i Wildlife Fund v. County of Maui, Civil No. 12-00198 SOM/BMK, 2014 WL 2451565, at \*16 (D. Haw. May 30, 2014). While the County respectfully disagrees with the Court’s ruling on Wells 3 and 4, the same is not the case with Wells 1 and 2 as no tracer study was performed on Well 1, and multiple tracer studies on Well 2 detected no entry point to the ocean. Thus, there is no legal or factual basis for applying that reasoning to Wells 1 and 2.

## II. SUMMARY JUDGMENT STANDARD

Summary judgment is proper where there is “no genuine issue as to any material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (internal citation and quotation marks omitted). The party bearing the burden of proof at trial—here, the Plaintiffs—has the burden of showing that a genuine dispute exists that precludes summary judgment. Id. That party cannot rely on its pleadings to make that showing. It must demonstrate through admissible evidence that a genuine dispute exists. First Nat. Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 289-290 (1968) (“sufficient evidence supporting the claimed factual dispute [must] be shown . . . .”). Moreover, disputes over immaterial facts do not matter. “[O]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” Cline v. Industrial Maint. Eng’g & Contracting Co., 200 F.3d 1223, 1229 (9th Cir. 2000) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (internal quotation marks omitted)).

## III. ARGUMENT

### A. The Point Source Discharge Requirement Must Be Met To Impose CWA § 301(a) Liability

CWA § 301(a) prohibits the “discharge of any pollutant” except in compliance with specified sections of the CWA, including an NPDES permit. 33 U.S.C. § 1311(a). “Discharge of a pollutant” is defined as “any addition of any

pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12).

“Point source” is defined as “any discernible, confined and discrete conveyance” including “any pipe, ditch, channel, tunnel, conduit, well . . . .” 33 U.S.C. § 1362(14).

To meet their burden to show the County’s injection of treated effluent from Wells 1 and 2 violates § 301(a), Plaintiffs must prove pollutants from Wells 1 and 2 enter the ocean via a point source discharge. Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 532 (9th Cir. 2001). Plaintiffs cannot meet this burden because they are unable to demonstrate the “point source discharge” requirement. Specifically, Plaintiffs cannot show that effluent from Well 1 or 2 reaches the ocean via a “discernible, confined and discrete conveyance.” Id.

**B. The County Has Not Violated The CWA Because There Is No Point Source Discharge To The Ocean**

**1. Indirect Discharges Must Pass Through Point Sources**

To demonstrate a point source discharge for purposes of CWA § 301(a) liability, Plaintiffs have two options: (1) a point source discharge directly to navigable waters (point source or direct discharge rationale); or (2) a series of sequential point sources conveying pollutants from the initial point of discharge to navigable waters (indirect discharge rationale). See Rapanos v. United States, 547 U.S. 715, 744 (2006). Neither rationale eliminates the mandatory point source requirement. Rather, the indirect discharge rationale “makes plain that a point

source need not be the original source of the pollutant; it need only convey the pollutant to ‘navigable waters.’” Id. at 743 (internal citation and quotation marks omitted). See also Tri-Realty Co. v. Ursinus Coll., Civil Action No. 11-5885, 2013 WL 6164092, at \*7, 8 (E.D. Pa. Nov. 21, 2013). Thus, “pollutants discharged from a point source do not [need to] emit ‘directly into’ covered waters, but pass ‘through conveyances’ in between” the initial point source and navigable water. Rapanos, 547 U.S. at 743 (internal citation omitted).

The cases the Supreme Court cite in Rapanos confirm an indirect discharge must still pass through discrete conveyances in reaching navigable waters. Id. at 743-744. In Sierra Club v. El Paso Gold Mines, Inc., 421 F.3d 1133, 1141(10th Cir. 2005), the indirect discharge was from a mineshaft through a tunnel to navigable waters. Likewise, United States v. Velsicol Chemical Corp., 438 F. Supp. 945, 946-947 (W.D. Tenn. 1976) involved an indirect discharge from a chemical facility through a municipal storm sewer into navigable waters. The indirect discharge in South Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 101 (2004) was from a pump station through a canal into navigable waters. In United States v. Ortiz, 427 F.3d 1278, 1281 (10th Cir. 2005), the indirect discharge was from a toilet at an industrial facility through a storm drain into navigable waters. Similarly, Dague v. City of Burlington, 935 F.2d 1343, 1354-1355 (2nd Cir. 1991) (rev’d on other grounds) involved seepage from a

landfill discharged through a culvert into navigable waters. Finally, in Concerned Area Residents for Env't v. Southview Farm, 34 F.3d 114, 118 (2d Cir. 1994), there was an indirect discharge from farm vehicles through a swale, a pipe and a ditch into navigable waters. In each case, the indirect discharges “pass ‘through conveyances’ in between” the source of the pollutants and navigable waters. Rapanos, 547 U.S. at 743 (internal citation omitted).

These basic CWA principles establish that pollutants entering navigable water through unconfined groundwater do not violate CWA § 301(a). Rather, the groundwater must be “confined” in *something else* to be a “point source” discharge. For example, LWRF effluent reaching the ocean through a single pipe, 50 small pipes or a lava-tube would meet the point source requirement and be regulated under § 301(a). See Tri-Reality Co., 2013 WL 6164092, at \*8 (pollutants from an underground storage tank that migrate through soil to groundwater which reaches navigable water is not a point source discharge); see also Greater Yellowstone Coal. v. Lewis, 628 F.3d 1143, 1153 (9th Cir. 2010) (precipitation percolating through overburden and soils that eventually reaches surface water is a nonpoint source); Friends of Santa Fe Cnty. v. LAC Minerals, Inc., 892 F.Supp. 1333, 1359 (D.N.M. 1995) (shallow seeps with trace pollutants emerging through soil are nonpoint source “carriers of water from the alluvium to the surface.”).

## **2. The Court's Conduit Theory Eliminates The Point Source Discharge Requirement**

By asserting that “liability under the [CWA] is triggered when pollutants reach navigable water, regardless of *how* they get there,” the Court eliminated the point source requirement for indirect discharges. Hawai'i Wildlife Fund, 2014 WL 2451565, at \*18 (emphasis in original). By expanding the indirect discharge theory such that a conduit no longer needs to be a “discernible, confined and discrete conveyance,” the Court nullified the meaning of point source. Id. at \*16 (“While any conduit that is a ‘confined and discrete conveyance’ is a point source, that does not mean that all conduits must be ‘confined and discrete conveyances’ . . . and the groundwater acting as a conduit need not also be ‘confined and discrete.’”). Conduit is part of a defined term of art under the CWA; it is one of the identified point source examples of a “discernible, confined and discrete conveyance.” 33 U.S.C. § 1362(14). Where Congress has unambiguously spoken, courts lack discretion in interpreting the statute. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-843 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress.”).

Contrary to the Court's prior opinion, generalized migration of pollutants from a point source through groundwater to navigable waters is not sufficient to impose CWA § 301(a) liability. Hawai'i Wildlife Fund, 2014 WL 2451565, at

\*14, 18. Pollutants must enter navigable water via a point source – *i.e.*, a discernible, confined and discrete conveyance. See El Paso Gold Mines, 421 F.3d at 1140-41, 1146 n.6 (“We stress, again, that it is the combination of the . . . [mine] shaft, a point source, and the . . . Tunnel, another point source, that establishes a connection to a navigable stream. This system of infrastructure distinguishes our case from migration and seepage cases.”); Trustees for Alaska v. E.P.A., 749 F.2d 549, 558 (9th Cir. 1984) (a point source discharge “reaches the water through a confined, discrete conveyance.”).

The “phrase ‘discernible, confined, and discrete conveyance’ cannot be interpreted so broadly as to read the point source requirement out of the statute.” Cordiano v. Metacon Gun Club, Inc., 575 F.3d 199, 219 (2nd Cir. 2009); see also Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs, 531 U.S. 159, 172 (2001) (“it is one thing to give [the] word[s] [discernible, confined and discrete conveyance] limited effect and quite another to give it no effect whatever.”). While a series of connecting point sources is permissible under the indirect discharge theory, expansion of the theory to unconfined groundwater as a conduit is not. See Hawai’i Wildlife Fund, 2014 WL 2451565, at \*14 (the Court acknowledges no controlling appellate law or statutory language has expanded the conduit theory beyond point source discharges).

**3. There Is No Point Source Discharge From Well 1 Or 2 To The Ocean**

The LWRF injection wells are the only confined and discrete conveyances here. 33 U.S.C. § 1362(14) (point source includes wells). As the wells inject into groundwater, and groundwater is not a navigable water, there is no basis to impose CWA § 301(a) liability based on a point source discharge of a pollutant from the LWRF directly to navigable waters.<sup>1</sup> This leaves the indirect discharge rationale as the only potential available theory for Plaintiffs to impose CWA § 301(a) liability. As explained below, because the groundwater here is not a “discernible, confined and discrete conveyance,” Plaintiffs cannot establish the essential indirect discharge theory prerequisite of sequential point sources in the conveyance of treated effluent from the LWRF to the ocean.

**a. The Groundwater/Effluent Mixture From Wells 1 And 2 Flows to And Enters The Ocean In A Broad And Diffuse Manner**

Contrary to the Court’s prior opinion, the groundwater between the LWRF and the ocean is not *itself* a point source because the groundwater is not a

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<sup>1</sup> Groundwater is not a “waters of the United States” as a matter of law. See 40 C.F.R. §§ 122.2, 230.3(s), 33 C.F.R. § 328.3(a); 56 Fed. Reg. 64,876, 64,892 (Dec. 12, 1991); San Francisco Baykeeper v. Cargill Salt Div., 481 F.3d 700, 706 (9th Cir. 2007). To the extent the Court (i) understood the County’s position was that groundwater could be classified as a navigable water, it was mistaken; or (ii) found the groundwater between the LWRF and the ocean is a navigable water under the CWA, this was incorrect as matter of law. See Hawai’i Wildlife Fund, 2014 WL 2451565, at \*11, 20-21. As pertinent here, the only “navigable water” is the ocean.

“discernible, confined and discrete conveyance.” See id. at \*17. Treated effluent from the LWRF exits Wells 1-4 at depths ranging from approximately 60 to 210 feet below ground surface with treated effluent exiting Wells 1 and 2 between approximately 60 and 165 feet below ground surface. Defendant County of Maui’s Rule 56.1 Statement of Undisputed Material Facts (“56.1”), ¶ 1. The roughly 100 foot expanse over which effluent from Wells 1 and 2 enters the groundwater is itself demonstrative of the lack of a defined or discrete conveyance. 56.1, ¶ 1. Upon entry, the effluent rises up and disperses broadly, both laterally and vertically, as it moves through the aquifer toward the ocean. 56.1, ¶ 2.

The Tracer Study findings on travel time for dye injected into Wells 3 and 4 to reach the submarine springs ranges from an initial appearance at 84 days, to peak concentrations between approximately 270 and 310 days, to an estimated four plus years for the tail end. 56.1, ¶ 8. The travel time for flow from Wells 1 and 2 to the ocean is even longer. 56.1, ¶ 8. This time span is further evidence that the flow path from the wells to the shoreline is broad and diffuse. 56.1, ¶ 8.

It is unknown where Well 1 flow enters the ocean. 56.1, ¶ 3. The same is true for Well 2. 56.1, ¶¶ 4-5, 7, 12. No tracer study has been performed on Well 1. 56.1, ¶ 3. Even with two independent tracer studies on Well 2 using different approaches (adding dye to Well 2 for 58 days or one day), neither study detected tracer dye, confirmed any point(s) of entry to the ocean, or reached a conclusion

regarding the hydrologic connectivity between Well 2 and the ocean. 56.1, ¶¶ 4-5. The Tracer Study recognizes this, saying “no conclusions can be made regarding the hydraulic connection between Well 2 and the nearshore waters at Kaanapali” (*i.e.*, Kahekili Beach); and “a discharge point deeper and further from shore needs to be considered.” 56.1, ¶ 5. The absence of dye illustrates the diffuse nature of the Well 2 flow as it travels through the aquifer and enters the ocean. 56.1, ¶ 6.

Modeling evidence supports the conclusion that the groundwater/effluent mixture from Wells 1 and 2 travels through the aquifer as broad and diffuse flow reaching the ocean at locations that are not readily ascertainable. 56.1, ¶ 4-7, 11-12. The County’s expert, Dr. List, modeled the flow from Wells 1 and 2 operating as a pair and Wells 3 and 4 operating as a pair, with both pairs operating at 50% injection rates. 56.1, ¶ 7. This model showed that flow from Wells 1 and 2 would be pushed to the lateral boundaries of the flow from Wells 3 and 4 (*i.e.*, outside the submarine spring area) and thus would not reach the ocean along the same path as effluent from Wells 3 and 4. 56.1, ¶ 7. The resulting broad and diffuse flow from Wells 1 and 2 through the aquifer also prevents identification of where the flow enters the ocean. 56.1, ¶ 7. Nonetheless, because the flow from Wells 1 and 2 is broader and more diffuse than the flow from Wells 3 and 4, it would enter the ocean over a larger area than the 800 meters of shoreline the Tracer Study estimates for flow entry from Wells 3 and 4. 56.1, ¶ 9.

Dr. List's conclusion is consistent with the Tracer Study modeling which showed flow from Well 2 would not appear at the submarine springs, but given the displacement caused by Wells 3 and 4, would be broad and diffuse through the aquifer entering at locations outside the submarine springs. 56.1 ¶ 7-9, 11. Given its diffuse nature, the groundwater/effluent mixture's flow to and entry into the ocean here does not meet the point source definition of a "discernible, confined and discrete conveyance."<sup>2</sup>

For their part, Plaintiffs rely solely on the report of Dr. Moran as the basis for their claim that Wells 1 and 2 enter the ocean along the same flow path and at the same locations as Wells 3 and 4. Dr. Moran's report does not create a genuine dispute of fact with respect to Wells 1 and 2. Her report identifies no point source discharge for any effluent from Wells 1 and 2 because the effluent reaches the ocean via groundwater which is insufficient, as a matter of law, to constitute a violation the CWA § 301(a).

Dr. Moran concedes the effluent injected into Well 2 would be displaced by the effluent from Wells 3 and 4 when they are operating and the information "necessary to locate preferential flow paths [for Wells 1 and 2], is not available."

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<sup>2</sup> By limiting its argument to Wells 1 and 2, the County does not concede the groundwater/effluent mixture from Wells 3 and 4, which similarly flows through the aquifer in a broad and diffuse manner and enters the ocean over at least 800 meters of coastline, is a point source discharge. 56.1, ¶ 9. To the contrary, the County maintains the mixture was improperly classified as a point source discharge and reserves all rights to challenge the classification at a later time.

56.1 ¶ 12. Her opinion relies on Wells 3 and 4 not being used. But that is not the case during the time period referenced in her report. 56.1, ¶ 20. Accordingly, Dr. Moran's report does not fit the facts of this case. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 591-592 (1993) (Expert testimony needs to be sufficiently tied to or "fit" the facts to be relevant ).

Dr. Moran's opinion is unreliable. She claims to "heavily" rely on the Tracer Study to opine that Wells 1 and 2 have similar flow paths as Wells 3 and 4 to the submarine springs. 56.1, ¶ 12. But the Tracer Study modeling directly contradicts Dr. Moran's opinion. 56.1, ¶ 11. As the Tracer Study notes, "the treated wastewater plume [from Wells 3 and 4] is broad" and this flow displaces the flow from Well 2, causing the even broader and more diffuse Well 2 flow in the aquifer to only enter the ocean substantially north of the submarine springs. 56.1, ¶¶ 8, 11. This modeling also shows that with Wells 3 and 4 dormant, the broad and diffuse Well 2 flow exits the ocean even further north than when Wells 3 and 4 are operating as well as at and south of the springs. 56.1, ¶ 11.

Dr. Moran also relies on flow from Wells 1 and 2 from 2006 through May 2007 making up approximately 50% of the total effluent injected into all four wells to support her conclusion that flow from Wells 1 and 2 would appear at the submarine springs roughly ten months later. 56.1, ¶ 12. In contrast, Dr. List's modeling, which uses 50% injection rates for each of the pairs of wells, shows

flow from Wells 1 and 2 is laterally displaced, emerging outside the boundaries of the submarine springs. 56.1, ¶ 7. Any suggestion by Dr. Moran that treated effluent from Wells 1 and 2 would make it to the ocean if Wells 3 and 4 were off is irrelevant. Between 2006 and July 2014 (the timeframes considered by Dr. Moran), Wells 3 and 4 were operating. 56.1, ¶ 12, 20. Bottom-line, Dr. Moran provides *no* evidence that (1) 50% of flow from Wells 1 and 2 is sufficient to nullify both the Tracer Study's and Dr. List's modeling, showing broad and disperse displacement of flow from these wells in the aquifer resulting in the flow entering the ocean away from the submarine springs; or (2) flow from Wells 1 and 2 enters the ocean at the same location as flow from Wells 3 and 4.

b. ***The Percent Of Treated Effluent Entering The Ocean Is Not A Basis For Demonstrating A Point Source Discharge***

In determining whether there is a point source discharge, the pertinent inquiry is *how* the treated effluent makes it to the ocean, not how much. See Trustees for Alaska, 749 F.2d at 558 (point sources are not distinguished from nonpoint sources “by the kind of pollution they create or by the activity causing the pollution, *but rather by whether the pollution reaches the water through a confined, discrete conveyance.*”) (emphasis added). Nonetheless, in finding the County liable under the CWA for Wells 3 and 4 based on the theory that groundwater was a point source, the Court relied in part on the Tracer Study's

estimate that 64% of effluent injected into the wells discharges from the submarine springs area. “Any conveyance that transmits such a high proportion of a pollutant from one place to another is consistent with being ‘confined and discrete,’ irrespective of its other geologic properties.” Hawai’i Wildlife Fund, 2014 WL 2451565, at \*17. Similarly, in referencing 65% of effluent discharging through Wells 3 and 4, Dr. Moran also appears to adopt the 64% estimate.

While the County maintains that the percentage of effluent reaching the ocean is irrelevant to a point source inquiry, it nonetheless notes that both the Court and Dr. Moran failed to account for the multiple limitations associated with the Tracer Study 64% estimate. The fraction of effluent reaching the submarine springs area from Wells 3 and 4 was estimated using two different methods. 56.1, ¶ 13. As the Tracer Study acknowledges, there are significant uncertainties with both. 56.1, ¶ 13. While the estimated percent of recovered dye mass can be used to estimate the fraction of effluent discharging at the submarine springs, “*it must be stressed that there are significant uncertainties associated with these calculations.*” 56.1, ¶ 13. Likewise, “[t]here is *significant uncertainty* associated with the effluent percentage estimated” due to the multiple assumptions regarding the discharge made in performing the calculations. 56.1, ¶ 13.

The failure to account for seasonal variability is an inherent uncertainty in the Tracer Study analysis. 56.1, ¶ 13. While the rate at which groundwater exits

the submarine springs varies significantly by season, a constant rate was used in the calculations. 56.1, ¶ 13. Likewise, dye concentrations measured at less than 1% of the submarine springs were used to calculate total dye recovery from the entire submarine spring area, ignoring the fact that diffuse dye concentrations ranged from as much as six-fold to ten-fold lower than spring dye concentrations. 56.1, ¶ 13. This was the case even though greater than 90% of the discharge was diffuse. 56.1, ¶ 10. In another instance, half of the calculated data sets used to estimate the percentages of upland waters, marine waters and LWRF effluent emanating from the submarine springs were thrown out because they yielded unrealistic results (*i.e.*, > 100% or < 0%). 56.1, ¶ 14. Of the data sets used, the fraction of LWRF effluent ranged from 12% to 96%. 56.1, ¶ 14.

As Dr. List illustrates, different plausible assumptions used to calculate the dye recovery rate result in only 11% of the treated effluent injected into Wells 3 and 4 coming out at the submarine springs area. 56.1, ¶ 15. Dr. List's calculation confirms (1) the assumptions used in the Tracer Study were either flawed or difficult to justify; (2) a variety of plausible assumptions could be used in the calculations; and (3) the assumptions chosen for the Tracer Study calculations dictated the outcome.<sup>3</sup> 56.1, ¶ 15. Given that percentage (or amount) of pollutant

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<sup>3</sup> Given the vast range in calculation, the County respectfully disagrees that the Tracer Study is sufficient evidence to impose CWA § 301(a) liability as a matter of law with respect to Wells 3 and 4.

is not relevant in determining a point source discharge and significant uncertainties surround the Tracer Study dye recovery rate calculations, the Court should not rely on the 64% estimate in making a point source finding.

**4. An NPDES Permit Cannot Be Issued For Well 1 Or 2**

An NPDES permit authorizes a facility to discharge pollutants into receiving (navigable) water under specified conditions. See CWA 33 U.S.C. § 1342(a), (k); 40 C.F.R. §§ 122.1, 122.5. Permits identify (1) permissible discharge limitations and locations; and (2) monitoring and reporting requirements to characterize both the discharge and receiving waters, and ensure compliance with permit conditions and water quality criteria. See generally 40 C.F.R. §§ 122.41, 122.43, 122.44. Permit applications require an outfall description, including its location, distance from shore and depth below surface. See e.g., 40 C.F.R. § 122.21(i). As no discernible ocean discharge location has been identified for Well 1 or 2, it is not feasible to issue an NPDES permit with appropriate standards, conditions and monitoring requirements for the wells. 56.1, ¶ 16.

**C. LWRF Flow To The Ocean Is Nonpoint Source Pollution**

**1. Groundwater Is Generally Considered Nonpoint Source Pollution**

With no statutory or regulatory definition, nonpoint source “includes all water quality problems not subject to [CWA] section 402.” National Wildlife Fed’n v. Gorsuch, 693 F.2d 156, 165-166 (D.C. Cir. 1982); see also Oregon

Natural Res. Council v. U.S. Forest Serv., 834 F.2d 842, 849 (9th Cir. 1987) (the CWA draws “a distinct line between point and nonpoint pollution sources.”).

Similar to groundwater, stormwater may contain pollutants, and depending on how it is conveyed to navigable waters, it may be either a point source or nonpoint source discharge. Stormwater entering navigable water through a confined and discrete conveyance is a discharge from a point source subject to NPDES permitting whereas diffuse runoff is not. See e.g., Environmental Def. Ctr., Inc., v. U.S. E.P.A., 344 F.3d 832, 841 n.8 (9th Cir. 2003) (“Diffuse runoff, such as rainwater that is not channeled through a point source, is considered nonpoint source pollution . . . .”) (internal citation omitted); Northwest Env'tl. Def. Ctr. v. Brown, 640 F.3d 1063, 1070 (9th Cir. 2011) (“Stormwater that is not collected or channeled and then discharged, but rather runs off and dissipates in a natural and unimpeded manner, is not a discharge from a point source . . . .”) (rev'd on other grounds); Greater Yellowstone Coal., 628 F.3d at 1152 (“some type of collection or channeling is required to classify an activity as a point source.”) (internal citation omitted); Cordiano, 575 F.3d at 221 (“surface water runoff which is neither collected nor channeled constitutes nonpoint source pollution and . . . is not subject to the CWA permit requirement.”) (internal citation omitted).

Importantly, the Watershed Management Plan that includes Kahekili Beach identifies LWRP effluent as nonpoint source pollution. 56.1, ¶ 17. Similarly, the

CWA identifies pollutants from well disposal and groundwater as nonpoint sources. 33 U.S.C. § 1314(f)(2)(D), (F). Likewise, the Hawaii Department of Health recognizes both nonpoint source pollution prevents surface waters from achieving water quality criteria and groundwater as a nonpoint source. 56.1, ¶ 17.

Pollutants reaching navigable waters via groundwater migration do not meet the point source discharge requirement. See Tri-Realty Co., 2013 WL 6164092, at \*7 (“A discharge of pollutants into navigable waters occurring only through migration of groundwater . . . represents ‘nonpoint source’ pollution.”) (internal citation omitted). “[T]he diffuse downgradient migration of pollutants . . . through . . . groundwater . . . is nonpoint source pollution . . . .” Id. at \*8; see also El Paso Gold Mines, 421 F.3d at 1140 n.4 (“Groundwater seepage that travels through fractured rock would be nonpoint source pollution, which is not subject to NPDES permitting.”).

Plaintiffs’ complaint characterizes the LWRF effluent as “percolating” into the ocean. First Amended Complaint ¶ 56. Pollutants entering navigable waters through percolation of groundwater constitute nonpoint source pollution. See e.g., Mary Cristina Wood, Regulating Discharges into Groundwater: The Crucial Link in Pollution Control Under the Clean Water Act, 12 Harv. Envtl. L. Rev. 569, 620 (1988) (percolating groundwater is not a point source discharge despite pollutants entering navigable waters). Because there is no point source discharge associated

with Well 1 or 2 to the ocean, Plaintiffs have failed to establish a CWA § 301(a) violation and the County is entitled to summary judgment as a matter of law. See Chesapeake Bay Found., Inc. v. Severstal Sparrows Point, LLC, 794 F. Supp. 2d 602, 619-20 (D. Md. 2011) (“[M]igrations of groundwater . . . is not point source pollution . . . There is no basis for a citizen suit for nonpoint source discharges under the CWA.”) (internal citations omitted); see also Oregon Natural Res. Council, 834 F.2d at 849.

## **2. Multiple Sources Of Pollutants Are In Groundwater Flowing To The Ocean**

The ocean off Kahekili Beach receives drainage from the northern part of the Wahikuli Watershed (“Watershed”). 56.1, ¶ 17. Nutrients from various Watershed land uses enter groundwater as it flows to the ocean. The Watershed’s past and present agricultural practices have “impacted the hydrology of surface waters and groundwaters.” 56.1, ¶ 18. Similarly, landscaped areas around resort, residential and commercial properties, and golf courses in the Watershed result in fertilizer nutrients impacting groundwater. 56.1, ¶ 18. The LWRF’s R-1 water applied for irrigation also contributes pollutants to groundwater. 56.1, ¶ 18.

These other sources of nutrients commingle in groundwater with LWRF effluent, preventing sources from being distinguished from one another. 56.1, ¶ 18. Moreover, groundwater enters the coastline at undefined locations. 56.1, ¶ 4-7, 9. In April 2014, the Hawaii Department of Health proposed modifying

applicable water criteria for Kahekili Beach to account for the more than three million gallons per day of fresh water entering the ocean per mile of shoreline. 56.1, ¶ 19; HAR § 11-54-6 (defining “wet” criteria). By definition, groundwater containing a mixture of sources of pollutants entering the ocean at unidentifiable locations is a nonpoint source – *i.e.*, there is no discernible, confined and discrete conveyance. See e.g., Trustees for Alaska, 749 F.2d at 558.

**D. The CWA Addresses LWRP Nonpoint Source Pollution**

Contrary to Plaintiffs’ allegations, water quality in the ocean off Kahekili Beach is improving. As of April 2014, the area meets total phosphorous and nitrogen-related water quality criteria. 56.1, ¶ 19.<sup>4</sup>

Simply because the groundwater here is nonpoint source pollution not regulated by an NPDES permit does not mean it is outside the scope of the CWA; it is addressed through other CWA programs such as total maximum daily loads and state nonpoint source pollution control programs. 33 U.S.C. §§ 1313, 1329.<sup>5</sup>

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<sup>4</sup> The remainder of this Section is provided as background on Hawaii’s nonpoint source pollution control program and is not dispositive to the County’s Motion.

<sup>5</sup> Congress clearly recognized the need to address nonpoint sources under the CWA. “The Clean Water Act, as written in 1972 and amended in 1977 and 1981, focused on point source discharges of pollution. Over the years, however, new information has indicated that nonpoint sources contribute up to 50 percent of the water pollution in some States. Thus, the conferees establish a new national policy to develop and implement programs for controlling nonpoint sources of pollution . . . With this new emphasis on nonpoint sources of pollution, we should be able to

See Pronsolino v. Nastri, 291 F.3d 1123, 1126 (9th Cir. 2002) (the CWA uses “distinctly different methods” to control point source and nonpoint source pollution) (internal citation omitted). The improvement in Kahekili Beach water quality demonstrates the success of these programs.<sup>6</sup>

Additionally, as required by the CWA and the Coastal Zone Act Reauthorization Amendments, Hawaii developed a statewide program and integrated implementation plan for management of coastal nonpoint source pollution. See Doyle Dec., Ex. 9 at 2-1; see also 16 U.S.C. § 1455b(a)(2) (the CWA § 319 nonpoint source program (33 U.S.C. § 1329) works in concert with Coastal Zone Act to address nonpoint sources impacting coastal waters); Shanty Town Assocs. Ltd. P’ship v. E.P.A., 843 F.2d 782, 794 (4th Cir. 1988) (Coastal Zone Act requirements complement CWA programs). In 2012, a watershed management plan was developed for a portion of West Maui (including Kahekili Beach) that includes protections for coral reefs from nonpoint source land-based pollution. See e.g. Doyle Dec., Ex. 4 at i.

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wage a more comprehensive and complete assault on water pollution throughout the Nation.” 133 Cong. Rec. 985 (1987).

<sup>6</sup> As Dr. List explains, material exiting the submarine springs has geothermal origins. Geothermal activity, and not LWRF effluent, accounts for many apparent anomalies at the submarine springs such as temperature and salinity. See Doyle Dec., Ex. 10, List Expert Report at 3, 6, 7, 12, 20, 22-27.

#### **IV. CONCLUSION**

CWA § 301(a) liability requires that pollutants discharge to navigable waters from a point source. The broad diffuse groundwater flow containing a mixture of LWRF effluent and other pollutants is not entering the ocean through a discernible, confined and discrete conveyance. As such, Plaintiffs have presented no evidence of a point source discharge. Because Plaintiffs do not meet their burden to demonstrate the requisite elements of a § 301(a) violation, the County is entitled to summary judgment on Wells 1 and 2 as a matter of law.

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